Supreme Court, U.S.
FILED
FEB 10 2003

No. 02-361

IN THE

Supreme Court of the United States

UNITED STATES, *et al.*,

Appellants,

v.

AMERICAN LIBRARY ASSOCIATION, INC., *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF OF *AMICUS CURIAE* JONATHAN WALLACE d/b/a THE ETHICAL SPECTACLE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICUS CURIAE *

Jonathan Wallace d/b/a The Ethical Spectacle respectfully submits this brief as *amicus curiae* in support of appellees' assertion that the district court correctly determined that Sections 1712 and 1721(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335 ("CIPA") are unconstitutional.

The Ethical Spectacle (http://www.spectacle.org) is an online publication focusing on the intersection at which ethics, law and politics meet in our civilization, particularly in the United States of America. This involves promoting freedom of speech, compassion, fairness and humility as the fundamental building blocks of private and public life. The Ethical Spectacle mission statement is available at: http://www.spectacle.org/mission.html. The Ethical Spectacle has appeared monthly on the World Wide Web since January, 1995. Wallace edits, and contributes at least one essay to, each issue. In connection with these activities, Wallace was a co-plaintiff in *Reno v. ACLU*, 521 U.S. 844 (1997) (the "Communications Decency Act" case) and in *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp. 2d 552 (E.D. Va. 1998) (case striking down the use of software filters in libraries).

The Ethical Spectacle has been blocked, in whole or part, by at least six software filters. *See Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 24 F. Supp. 2d at 558. Individual content of The Ethical

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* The parties have consented to the filing of this brief. Their letters of consent are being lodged herewith. This brief has been authored in its entirety by undersigned counsel for the *amicus curiae*. No person or entity, other than the named *amicus* and its counsel, made any monetary contribution to the preparation and submission of this brief.

Spectacle that has been blocked by various filters include parts of a compilation of materials about free speech (http://www.spectacle.org/musm.html) and an issue containing several essays about the social implications of pornography (http://www.spectacle.org/1195/). Wallace's account of being blocked by various software filters appears at http://www.spectacle.org/cs/means.html.

Wallace believes that CIPA would prevent individuals from accessing constitutionally protected speech that has substantial scientific, political, social and literary value.

The *amicus* urges this Court to clarify and stabilize the legal rules applicable to the Internet by according speech on the Internet the highest protection bestowed upon speech in any medium. To do so, the Court should acknowledge the essential similarity between the Internet and print media.

STATEMENT OF THE CASE AND SUMMARY OF ARGUMENT

Sections 1712 and 1721(b) of the Children's Internet Protection Act, Pub. L. No. 106-554, Div. B, Tit. XVII, 114 Stat. 2763A-335 ("CIPA") are an intrusive government regulation of constitutionally protected speech, fashioned in apparent ignorance of the technological medium it was intended to regulate. We join with appellees to urge affirmance of the judgment below holding that CIPA is unconstitutional. We file this brief, however, to urge this Court to focus on an issue the Court deferred in its previous opinion related to the government's attempts to regulate constitutionally protected speech on the Internet. *See Reno v. ACLU*, 521 U.S. 844 (1997).

We respectfully disagree with the Court's conclusion in *Reno* that it is both possible and desirable to determine *how*

to treat a new medium without first determining *what* it is. In the past, this Court has walked on firmer ground when it determined the proper legal regime for new media by seeking the correct analogy. We believe there is no proper alternative but to do so here.

This Court should recognize that the print medium is the proper analogy for the Internet. Like print, the Internet is a means for the replication, storage and transmission of huge amounts of text and images of every description and on every topic. The Internet is a global library or bookstore of all human knowledge and imposing any scheme of regulation more restrictive than that allowed for the print medium would have profoundly destructive effects. Only by recognizing the analogy between the Internet and print media will this Court assure the appropriate protection of the medium which is likely to become the main conduit for personal, political and creative speech for many decades to come.

Confusion over the proper analogy for the Internet has led and will continue to lead to a wide variety of opposing and legally infirm actions in state and federal courts, Congress and state legislatures, including federal and state laws regulating content, as well as the prosecution of individuals for speech which would clearly be protected in print. Only by issuing a clear ruling that the Internet is analogous to print media can this Court assure the development of a stable legal regime. Stability will promote the growth of this medium, while the application of rules more restrictive than those permitted for print will stifle the Internet's maturation and will also lead to the contradictory result of the same content receiving different treatment in electronic format than on paper.

Therefore, we join appellees in requesting this Court to affirm and further urge that it eliminate legal confusion by

specifically declaring that the Internet is analogous to, and should for First Amendment purposes be treated like, print media.

ARGUMENT

I.

THE TIME IS RIPE FOR THIS COURT TO SELECT THE CORRECT ANALOGY FOR CYBERSPACE.

For a court to consider the proper legal regime for a new communications medium, it is essential that it first select an appropriate analogy to prior media. A decision not founded on analogical reasoning runs the risk of misapprehending the social significance of a new technology, and therefore applying the wrong rules.

In *Technologies of Freedom*, communications scholar Ithiel de Sola Pool traced the process used by this Court and others in the nineteenth century to resolve disputes pertaining to the telegraph and telephone:

> Courts like to treat new phenomena by analogy to old ones. When the telephone was invented, the question was whether, at law, the telephone was a new kind of telegraphy or something different. If the phone was a telegraph, a body of law already existed that would apply. The decisions sometimes went one way, sometimes the other; but the model of the telegraph was always there to be considered.

Ithiel de Sola Pool, *Technologies of Freedom* 100 (1983).

This Court has usually adopted such an approach and has searched for the appropriate analogy in determining the

proper legal regime for a new technology. In *Primrose v. Western Union Telegraph Co.*, 154 U.S. 1 (1894), this Court selected the railroad as the appropriate analogy for the telegraph, thus determining which line of precedents to follow. In applying analogical reasoning, the *Primrose* Court recognized that "[t]elegraph companies resemble railroad companies and other common carriers, in that they are instruments of commerce, and in that they exercise a public employment, and are therefore bound to serve all customers alike, without discrimination." *Id.* at 14.

The issue arose, as well, when the telephone was in its infancy, and many courts chose to apply jurisprudence developed for the telegraph. *See, e.g., Northwestern Tel. Exch. Co. v. Chicago, M. & St. P. Ry. Co.*, 79 N.W. 315, 317 (1899) ("The rule is well established that in applying the principles of the common law or in construing statutes the telephone is to be considered a telegraph"); *Hudson River Tel. Co. v. Watervliet Turnpike & Ry. Co.*, 32 N.E. 148, 149 (1892) (applying statutes authorizing telegraph transmission to telephone); *Attorney General v. Edison Telephone Co.*, 6 Q.B.D. 244 (1880) (same); *See also Duke v. Central New Jersey Telephone Co.*, 21 A. 460 (N.J. 1891) (The telephone is a "novel method for accomplishing the object for which telegraphs were erected"); *But see City of Richmond v. Southern Bell Telephone & Telegraph Co.*, 174 U.S. 761 (1899) in which this Court declined to follow this analogy.

Determinations that fail to utilize analogical reasoning are almost always eroded over time or reversed later, but may cause harm in the intervening years. For example, when this Court first considered the applicability of the First Amendment to the newly created technology of motion pictures in *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230 (1915), it distinguished them from the press and denied them protection on the grounds they were

"a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of this country, or as organs of public opinion." *Id.* at 244.

Then, in 1952, in *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the Court reversed itself, properly recognizing the analogy between movies and printed matter:

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures.

Id. at 501.

The Court went on to acknowledge a need for consistency among the treatment of varying media: "Each method [of communication] tends to present its own peculiar problems. But the basic principle of freedom of speech and of the press, like the First Amendment's commandments, do not vary." *Id.* at 503.

In *Leathers v. Medlock*, 499 U.S. 439 (1991), Justices Marshall and Blackmun more recently expressed a similar view. "Although cable television transmits information by distinctive means, the information service provided by cable does not differ significantly from the information services provided by . . . newspapers, magazines, television broadcasters, and radio stations." *Id.* at 457 (Marshall, J., joined by Blackmun, J., dissenting).

In other words, to attain consistency of First Amendment outcomes, the courts and the legislatures should treat the method of storage or transmission as irrelevant, and focus instead upon the information itself.

Notwithstanding the effectiveness of analogical reasoning in deciding media cases and the judicial success stories associated with it, this Court still seems reluctant to apply this approach when it comes to new media. In 1996, a fragmented Court in *Denver Area Educational Telecommunications Consortium, Inc. v. F.C.C.*, 518 U.S. 727 (1996) declined to identify an appropriate analogy for cable television:

> [N]o definitive choice among competing analogies (broadcast, common carrier, bookstore) allows us to declare a rigid single standard, good for now and for all future media and purposes. . . . Rather, aware as we are of the changes taking place in the law, the technology, and the industrial structure, related to telecommunications, we believe it unwise and unnecessary to pick one analogy or one definitive set of words now.

Id. at 742-43 (citations omitted).

Indeed, Justices Kennedy and Ginsburg noted that the plurality erred in declining to identify the correct analogy for cable, and thereby missed an important decisional opportunity:

> The [plurality] opinion treats concepts such as public forum, broadcaster, and common carrier as mere labels rather than as categories with settled legal significance; it applies no standard, and by this omission loses sight of existing First Amendment doctrine. When confronted with a threat to free speech in the context of an emerging technology, we ought to have the discipline to analyze the case by reference to existing elaborations of constant First Amendment principles.

Id. at 780-81 (Kennedy, J., joined by Ginsburg, J., concurring in part, concurring in the judgment in part and dissenting in part).

Moreover, they asserted that the "creation of standards and adherence to them, even when it means affording protection to speech unpopular or distasteful, is the central achievement of our First Amendment jurisprudence." *Id.* at 785. The use of analogy is a "responsibility," rather than the "luxury" the plurality considered it to be. *Id.* at 787. Ultimately, Justices Kennedy and Ginsburg concluded as follows:

> Another troubling aspect of the plurality's approach is its suggestion that Congress has more leeway than usual to enact restrictions on speech when emerging technologies are concerned, because we are unsure what standard should be used to assess them. Justice Souter recommends to the Court the precept, 'First, do no harm.' . . . The question, though, is whether the harm is in sustaining the law or striking it down. If the plurality is concerned about technology's direction, it ought to begin by allowing speech, not suppressing it.

Id.

In his concurrence in *Denver*, Justice Souter expressed some concern that the adoption of a standard might "have immense, but now unknown and unknowable effects" on related technologies. *Id.* at 777. However, he also stated that a strict categorical approach "keeps the starch in the standards for those moments when the daily politics cries loudest for limiting what may be said." *Id.* at 774.

In *Reno v. ACLU*, 521 U.S. 844 (1997), the Court had the opportunity to select the proper analogy to determine a consistent legal regime for the Internet. Yet, the Court declined to do so, stating that "[a]nyone with access to the Internet may take advantage of a wide variety of communication and information retrieval methods. These methods are constantly evolving and difficult to categorize precisely." *Id.* at 851. Notwithstanding this disinclination, the Court did imply throughout the opinion that the Internet was more analogous to print than to other media.

Thus, the Court used several bookstore, pamphleteer, publisher and library examples to describe the various ways in which content on the Internet is presented.

> From the publishers' point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers and buyers. Any person or organization with a computer connected to the Internet can "publish" information. Publishers include government agencies, educational institutions, commercial entities, advocacy groups, and individuals.

Id. at 853. "Through the use of Web pages, mail exploders, and newsgroups, [anyone] can become a pamphleteer." *Id.* at 870. "The CDA is therefore akin to a law that makes it a crime for a bookstore owner to sell pornographic magazines to anyone once a minor enters his store." *Id.* at 893. "The Web is thus comparable, from the readers' viewpoint, to [] a vast library including millions of readily available and indexed publications. . . ." *Id.* at 853.

The Court further implied that the Internet is more like print by distinguishing the Internet from other media. Quoting the district court, this Court stated "[u]nlike communications

received by radio or television, 'the receipt of information on the Internet requires a series of affirmative steps more deliberate and directed than merely turning a dial. A child requires some sophistication and some ability to read and to retrieve material and thereby to use the Internet unattended.'" *Id.* at 854. (citing the district court's Findings of Fact in *ACLU v. Reno*, 929 F. Supp. at 845).

Later in the opinion, the Court laid out the history and rationale for several previous decisions for the way various media should be treated for First Amendment purposes:

> Each medium of expression . . . may present its own problems. Thus, some of our cases have recognized special justifications for regulation of the broadcast medium that are not applicable to other speakers. In these cases, the Court relied on the history of extensive Government regulation of the broadcast medium, the scarcity of available frequencies at its inception and its invasive nature. *Those factors are not present in cyberspace.* Neither before nor after the enactment of the CDA have the vast democratic forums of the Internet been subject to the type of government supervision and regulation that has attended the broadcast industry. *Moreover, the Internet is not as invasive as radio or television.*

Id. at 868-869 (emphasis added).

The Court further differentiated the Internet from radio and broadcast precedents by holding the "spectrum scarcity" rationale used by the Court in *Pacifica* inapplicable to the Internet. "[U]nlike the conditions that prevailed when Congress first authorized regulation of the broadcast spectrum, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds." *Id.* at 870.

The Court stopped short, however, of firmly stating that for First Amendment purposes, the Internet should be given the highest degree of protection. In essence, the Court drew all the dots necessary to create a picture but failed to connect them. Indeed, buried at the end of Footnote 30, the Court stated that it did not consider the print analogy "[b]ecause appellees do not press this argument before the Court. . . ." *Id.* at 863.

The Court's failure to analogize the Internet to a prior medium has resulted in conflicting comparisons and definitions in lower courts. For example, in *American Library Association v. Pataki*, 969 F. Supp. 160 (S.D.N.Y. 1997), Judge Preska found that "the Internet is analogous to a highway or railroad." *Id.* at 161.

In *Mainstream Loudon v. Board of Trustees of the Loudon County Library*, 2 F. Supp. 2d 783 (E.D. Va. 1998), Judge Brinkema, ruling against the use of software filters on computer terminals at libraries said "[t]he Internet therefore more closely resembles plaintiff's analogy of a collection of encyclopedias from which defendants have laboriously redacted portions deemed unfit for library patrons." *Id.* at 793-4.

The district court judges in *ACLU v. Reno* also differed in their respective choice of analogies. For Chief Judge Sloviter, "Internet communication, while unique, is more akin to telephone communication, at issue in *Sable*, than to broadcasting, at issue in *Pacifica* . . ." *ACLU v. Reno*, 929 F. Supp. 824, 851 (E.D. Pa. 1996).

Judge Dalzell, on the other hand, argued that the Internet is a "new medium of mass communication, . . . [and] that First Amendment jurisprudence requires consideration of its special qualities . . ." *Id.* at 872. He further argued that,

"[t]he Internet is a far more speech enhancing medium than print, the village green, or the mails. . . . [and] may fairly be regarded as a never-ending worldwide conversation." *Id.* at 882-83.

In this case now before the Court, a second opportunity is presented where the Court can, once and for all, clearly and firmly state that the Internet, as "the most participatory form of mass speech yet developed" should be entitled to "the highest protection from governmental intrusion." *Reno v. ACLU*, 521 U.S. at 863 (citing Judge Dalzell's opinion in *ACLU v. Reno*, 929 F. Supp. at 883).

II.

THE PROPER ANALOGY FOR CYBERSPACE IS PRINT.

In discussing the lower court's opinion in *ACLU v. Reno*, this Court mentioned, albeit in a footnote, that:

> [f]our related characteristics of Internet communication . . . lead to the conclusion that Congress may not regulate indecency on the Internet at all. . . . First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.

Reno v. ACLU, 521 U.S. 844, 863. This description emphasizes the Internet's similarity to print media, where the barriers to entry are also lower than they are for broadcast

media and therefore, provide significant access to all who wish to distribute their own works of print.

Moreover, there seems to be a growing propensity, endorsed by Justice Thomas and joined by the Chief Justice and Justice Scalia in the *Denver* case, to regard even cable television as analogous to print:

> In *Turner Broadcasting Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994), by adopting much of the print paradigm, and by rejecting *Red Lion*, we adopted with it a considerable body of precedent that governs the respective First Amendment rights of competing speakers. . . . Drawing an analogy to the print media, for example, the author of a book is protected in writing the book, but has no right to have the book sold in a particular bookstore without the storeowners consent. Nor can government force the editor of a collection of essays to print other essays on the same subject.

518 U.S. at 816 (Thomas, J., joined by Rehnquist, C.J., and Scalia, J., concurring in the judgment in part and dissenting in part).

As Justice Thomas also explained in *Denver*, 518 U.S. at 815, this Court appeared to support a similar position in *Turner*, when it wrote:

> The broadcast cases are inapposite in the present context because cable television does not suffer from the inherent limitation that characterizes the broadcast medium. . . . At the heart of the First Amendment lies the principle that each person should decide for him or herself the ideas or

> beliefs deserving of expression, consideration and adherence. Our political system and cultural life rest upon this ideal.

Turner, 512 U.S. at 638-39.

If print is to become the preferred analogy selected for cable, it would seem obvious that print would also be the correct analogy for cyberspace. Indeed, it would be illogical to assimilate the Internet to a broadcast model if such a model was not used for cable, which is far more similar to broadcast television than the Internet. "The weight of opinion at the moment seems to have shifted toward adopting a unitary print media model for the entire mass media." Lee C. Bollinger, *Images of a Free Press* 86 (1991) (discussing *Columbia Broadcasting Sys. v. F.C.C.*, 453 U.S. 367 (1981) (Fairness Doctrine case analogizing broadcasters to print journalists)).

Even the government has used a similar analogy when referring to content on the Internet. In the Joint Stipulation of Uncontested Facts submitted during the challenge to the constitutionality of the Child Online Protection Act ("COPA") in *ACLU v. Reno*, 31 F. Supp. 2d 473, the government agreed that, "[w]hen information is made available, it is said to be "*published*" on the Web." *Id.* at 483 (emphasis added).

A major advantage of the analogy to print is that it forces legislators and judges to focus on the First Amendment's protective goals, rather than losing sight of them in a fruitless analysis of technological distinctions without a difference. As Professor Tribe concluded: "[T]he Constitution's norms, at their deepest level, must be invariant under merely technological transformations." Laurence Tribe, *The Constitution in Cyberspace*. Adoption of a print analogy will avoid the differential treatment of the same text in print and electronic versions.

Filtering software routinely blocks content that no librarian would remove from a shelf. For example, the Smartfilter product installed in libraries in Utah was found to have blocked The Adventures of Sherlock Holmes, A Connecticut Yankee in King Arthur's Court, all of Shakespeare's plays and even The Declaration of Independence, George Washington's Farewell Address, The United States Constitution, The Mayflower Compact and The Bible. *See Censored Internet Access in Utah Public Schools and Libraries*, at http://censorware.net/reports/utah/main.html. Analogizing Internet content to print media for purposes of First Amendment treatment clearly mandates affirmation of the result below; that filtering software is not "narrowly tailored" and should not be used in libraries.

Only by treating the Internet as analogous to print media will this Court ensure the full applicability of the First Amendment in the 21st Century. It is an imaginable, even a likely outcome, that someday information presented on paper will constitute merely a small percentage of all the available information, with the rest stored in electronic format on the Internet and associated networks. Only by extending to the Internet the full protections of the First Amendment established for print will this Court ensure that the same information, whether in electronic or paper form, will receive consistent treatment.

Therefore, the *amicus* argues that "[t]he Internet, for free speech purposes, should be regarded as a constellation of printing presses and bookstores." Jonathan Wallace & Michael Green, *Bridging The Analogy Gap: The Internet, The Printing Press and Freedom of Speech*, 20 Seattle U.L. Rev. 711, 746 (citing Jonathan Wallace and Mark Mangan, *Sex, Laws & Cyberspace*, 228). To this end, the *amicus* urges the Court to take the position set forth by Judge Dalzell in his opinion in the *ACLU v. Reno* case:

> My examination of the special characteristics of Internet communication, and review of

> the Supreme Court's medium-specific First Amendment jurisprudence, lead me to conclude that the Internet deserves the broadest possible protection from government imposed, content based regulation. If "the First Amendment erects a virtually insurmountable barrier between government and the print media," . . . even though the print medium fails to achieve the hoped for diversity in the marketplace of ideas, then that "insurmountable barrier" must also exist for a medium that *succeeds* in achieving that diversity.

ACLU v. Reno, 929 F. Supp. at 881 (citations omitted).

CONCLUSION

In conclusion, this case provides an opportunity for this Court to create uniformity from inconsistency and order from confusion. We respectfully urge this Court to accomplish this task by finding that, for First Amendment purposes, *print* is the proper analogy for the Internet.

Respectfully submitted,

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